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No. 89-1063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the decision orally rendered by the District Court at the January 26, 1989 hearing was final in light of the fact that the Court requested Defendant-Respondent to submit suggested findings of fact and conclusions of law, that the Court then allowed Plaintiff-Petitioner a specified period of time to respond to the suggested findings and conclusions, and that the Court then indicated it would modify, add to, or delete and enter its own findings of fact and conclusions of law and judgment?

2. If the answer to Question No. 1 is in the negative, whether a premature notice of appeal may be considered as if taken from a subsequently entered final order?

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BRIEF FOR RESPONDENT

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED

In addition to 28 U.S.C. §1291 and Fed. R. App. P. 4(a)(2), which are cited and reproduced at pages 1-2 of the Petition for a Writ of Certiorari, this case also involves Fed. R. App. P. 4(a)(4). Fed. R. App. P. 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order

denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

STATEMENT OF THE CASE

The Petitioner, Firstier Mortgage Co. ("Firstier") commenced this litigation when it brought suit to recover on eight policies of private mortgage insurance which were underwritten by the Respondent, Investors Mortgage Insurance Co. ("IMI")[1]. The trial court's jurisdiction was grounded on 28 U.S.C. §1332. IMI moved for summary judgment on the grounds that the policies were rendered void and unenforceable because of fraud and material misrepresentations made by and in behalf of Firstier in the insurance applications.

On January 26, 1989 the trial court heard oral argument on IMI's Motion For Summary Judgment. After hearing oral argument, the trial court announced that "the policies should be and are cancelled as void for want of fraud, bad faith." *See* January 26, 1989 Transcript of Hearing Before the Honorable Luther L. Bohanon, United States District Judge (hereafter, "Tr. 1/26/89"), attached as Appendix C to the Petition for a Writ of Certiorari, at page 15.

[1] IMI's parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates are: Investors Mortgage Insurance Holding Company; Investors Equity Insurance Company, Inc.; Financial Products and Services, Inc. (formerly Investors Conduit Corp.); and Investors Mortgage Financial Services, Inc.

At the January 26, 1989 hearing the trial court requested IMI to submit suggested findings of fact and conclusions of law. The trial court specifically advised the parties that after giving Firstier an opportunity to object to IMI's suggested findings and conclusions, the trial court would write its own findings of fact and conclusions of law *and judgment*. Tr. 1/26/89, Appendix C to the Petition in Error at 15-16. The trial court said:

> The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court then will modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about.

Id. at 15.

On February 8, 1989, Firstier filed a Notice of Appeal from the January 26, 1989 oral announcement. Subsequently, on February 13, 1989, Firstier filed what it called its "Objection to Defendant's Suggested Findings of Facts and Conclusions of Law." Firstier's "Objection" controverts virtually every suggested finding and conclusion submitted by IMI. In fact, Firstier's "Objection" concludes with the assertion that "IMI is not entitled to summary judgment." Doc. 153 at 21. Firstier's "Objection" is attached hereto as Appendix "A".

On February 13, 1989, Firstier also filed a separate document which it called "Firstier's Suggested Findings of Fact and Conclusions of Law." Firstier's "Suggested Findings" is an argumentative document that reasserts virtually every factual and legal argument that Firstier had made in opposition to IMI's Motion for Summary Judgment. As with the February 13, 1989 "Objection",

Firstier's "Suggested Findings" argue for findings and conclusions which are directly contrary to those submitted by IMI. Firstier's "Suggested Findings" conclude by urging the trial court to reverse the January 26, 1989 oral announcement and to find that "IMI is not entitled to summary judgment." Doc. 152 at 19. Firstier's "Suggested Findings" are attached hereto as Appendix "B".

On March 3, 1989, the trial court formally rendered its "Order and Judgment" in favor of IMI, thereby implicitly overruling Firstier's "Objections" and "Suggested Findings". Appendix "D" to the Petition for a Writ of Certiorari. Also on March 3, 1989, the Court separately rendered a "Memorandum Opinion" which contained the Court's findings of fact and conclusions of law. Appendix "E" to the Petition for a Writ of Certiorari. The Court's Memorandum Opinion is reported at 708 F. Supp. 1224 (W.D. Okl. 1989). On March 3, 1989, the final "Order and Judgment" of the trial court was entered on the clerk's docket pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure. Appendix "F" to the Petition for a Writ of Certiorari.

LEGAL ARGUMENTS AND AUTHORITIES

PROPOSITION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

The January 26, 1989 oral announcement was an interlocutory, nonappealable decision. The trial court requested that the Respondent prepare suggested findings of fact and conclusions of law and allowed the Petitioner a specified period of time to respond thereto. The trial court ex-

pressly informed the parties that after reviewing the suggested findings and conclusions, the court would "modify, add to or delete" from them as the court deemed appropriate and would then "write its own findings of fact and conclusions of law and judgment." Thus, the court clearly indicated its intent to retain jurisdiction over the case until it entered a final order.

Further, the oral announcement was treated as interlocutory by the parties. Both parties submitted suggested findings of fact and conclusions of law. In fact, the Petitioner even urged the Court to reverse its preliminary decision and to find that the Respondent was *not* entitled to summary judgment. There is no real conflict among the circuits that under such circumstances the oral announcement was an interlocutory, not a final, decision and that the Court of Appeals properly declined jurisdiction. Consequently, a review on certiorari is neither necessary nor appropriate and the Petition for a Writ of Certiorari should be denied.

A. THE PRELIMINARY DECISION ORALLY RENDERED BY THE TRIAL COURT AT THE JANUARY 26, 1989 HEARING WAS NOT A FINAL APPEALABLE ORDER BECAUSE THE TRIAL COURT INTENDED THAT THE ORAL ANNOUNCEMENT WOULD BE FOLLOWED WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.

Under Fed. R. App. P. 4(a)(1), a notice of appeal in a civil case must be filed within thirty days after entry of the judgment or order from which appeal is taken. This time limit is "man-

datory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1978); *Maryland Casualty Co. v. Conner,* 382 F.2d 13, 15 (10th Cir. 1967). Further, 28 U.S.C. §1291 vests the Courts of Appeals with appellate jurisdiction only over "final decisions" of the district courts. In pertinent part, §1291 provides:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

The Supreme Court has long held that a final decision under §1291 is one which "ends the litigation on the merits and leaves nothing for the court to do but execute on the judgment." *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). *Accord, Century Laminating, Ltd. v. Montgomery,* 595 F.2d 563, 565 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979). Measured by this standard, the trial court's oral announcement at the January 26, 1989 hearing was not a final decision. Indeed, at the January 26, 1989 hearing the trial court requested IMI to submit suggested findings and conclusions and made clear that after modifying, adding to, or deleting from IMI's suggested findings the trial court would write its own findings and conclusions and judgment. Under such circumstances the oral announcement is not a final appealable decision under 28 U.S.C. §1291. *Carnes v. United States,* 279 F.2d 378, 379-80 (10th Cir. 1960), *cert. denied,* 364 U.S. 846 (1960).

In *Carnes,* the Tenth Circuit held that an oral announcement cannot constitute a final decision

when the trial court indicates that it intends to follow the oral announcement with a formal judgment:

> For the purpose of an appeal, a final judgment is the court's act or pronouncement which disposes of the matter under consideration .... When the Judge acts in a manner which clearly indicates his decision that the act shall be the final one in the case and a notation of the act has been entered on the docket, the time to appeal begins to run under Rule 73(a). But if it is not clearly indicated that the Judge's act was intended to be his final act in the case, and if it appeared that a formal judgment is contemplated, then the time for appeal does not begin to run.

Id. at 379-380 (citations omitted). The *Carnes* Court concluded:

> From the record as a whole, including the showing that a formal order was signed at a later date, we conclude that the judge did not intend his declaration from the bench to be his final act, but did intend that a formal order denying the motion would be prepared and signed by him.

Id. at 380 (footnote omitted). *Accord Director of Revenue, State of Colorado v. United States,* 392 F.2d 307, 309 (10th Cir. 1968) ("where the court has power to further review its judgment, it cannot be said that the judgment is final as long as it is being considered by the court").

The Supreme Court has held similarly:

> "Where, as here, a final judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or docket entry. * * * The judge was con-

> scious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran."

United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 235, 78 S.Ct. 674, 679, 2 L.Ed.2d 721 (1958).

Pursuant to these authorities, because the trial court indicated that it would enter formal findings and conclusions and a separate judgment, and because the trial court expressly reserved the right to modify, add to, or delete from the suggested findings, it is clear that the oral announcement was not a final appealable decision. Consequently, the Court of Appeals properly dismissed Firstier's appeal.

B. THE FEBRUARY 8, 1989 NOTICE OF APPEAL WAS FILED PREMATURELY AND IS INEFFECTIVE.

Rule 4(a)(1) of the Rules of Appellate Procedure provides, in pertinent part:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within thirty days after the date of entry of the judgment or order appealed from.

The January 26, 1989 oral announcement was not a final decision because the court evidenced its intention to retain jurisdiction and to write its own findings of fact and conclusions of law and judgment. Final judgment was not entered until March 3, 1989, when the court filed its "Memorandum Opinion" and a separate "Order and Judgment" and the same was entered on the clerk's docket. Consequently, the February 8, 1989 Notice of Appeal, filed before final judgment was rendered, was premature under Rule 4(a)(1) and was ineffective to vest the Court of Appeals with appellate jurisdiction:

> "Where the trial court has power to further review its judgment it cannot be said that the judgment is final as long as it is being considered by the court . . . An attempt to appeal a non-final decision of a district court remains just that, an attempt. It is a nullity and does not divest the trial court of its jurisdiction."

Century Laminating, Ltd. v. Montgomery, 585 F.2d 563, 567 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979). *Accord Euziere v. United States*, 266 F.2d 88, 91 (10th Cir. 1959), *vacated on other grounds*, 364 U.S. 282, 80 S.Ct. 1615, 4 L.Ed.2d 1720 (1960); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543 (1977).

The *Century Laminating* Court concluded by noting that when a premature appeal is filed interests of justice *do not* require the Court to give effect to the appeal; instead, the Court held that the "virtue in finality" mandates dismissal "especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself". *Id.* at 568. Because the January 26, 1989 oral

announcement was not intended as the court's final act, the oral announcement was not a final decision, the appeal was premature, and the Court of Appeals properly dismissed the case for want of jurisdiction.

C. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH BANKER'S TRUST CO. V. MALLIS.

The Federal Rules of Civil Procedure require that all judgments be set forth on a separate document and provide that a judgment is not effective until entered on the civil docket. Specifically, Fed. R. Civ. P. 58 provides in part:

> Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."

The Advisory Committee that drafted the separate-document requirement noted that prior to its adoption there was confusion over whether words contained in a written opinion or memorandum, like " 'the plaintiff's motion [for summary judgment] is granted,' " constitutes a final decision. The Advisory Committee reasoned that the separate-document requirement "eliminates these uncertainties by requiring that there be a judgment set out on a separate document — distinct from any opinion or memorandum — which provides the basis for the entry of judgment." *See* Notes of Advisory Committee on Rules, Fed. R. Civ. P. Rule 58 (West Pub. Co.), 28 U.S.C.A. at 642. The Supreme Court has recognized that "[t]he sole purpose of the separate-document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal under 28 U.S.C.

§2107 begins to run." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, 98 S.Ct. 1117, 1120, 55 L.Ed.2d 357 (1978) (footnote omitted).

The January 26, 1989 oral announcement did not satisfy the requirements of Rule 58. The oral announcement was not a final judgment; therefore, it was not set forth on a separate document and was not entered on the clerk's docket. However, Firstier relies on *Bankers Trust* to argue that the parties "waived" the separate-document requirement. To be sure, the *Bankers Trust* case did hold that in an appropriate case the separate-document rule could be waived; however, the *Bankers Trust* case was limited to the situation where judgment has been entered on the clerk's docket but the separate document required by Rule 58 "has *accidentally* not been entered." *Bankers Trust*, 425 U.S. at 388, 98 S.Ct. at 1121 (emphasis added).

Significantly, the appeal in the *Bankers Trust* case was taken from a combined opinion and order of the trial court which expressly concluded: " 'Complaint dismissed in its entirety. So ORDERED.' ". Further, an entry was made on the clerk's docket on the same day containing those same words. *Id.* at 382, n. 1, 98 S.Ct. at 1119, n. 1. The *Bankers Trust* Court reasoned that under such circumstances the Court of Appeals could properly assert appellate jurisdiction. The Supreme Court's analysis is instructive:

> "[T]he District Court clearly evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case. A judgment of dismissal

was recorded in the clerk's docket. And petitioner did not object to the taking of the appeal in the absence of a separate judgment."

Bankers Trust, 435 U.S. at 387-388, 98 S.Ct. at 1127.

None of these circumstances are present in the instant case. First, the trial court did not indicate that its oral announcement would represent the final decision in the case. On the contrary, the trial court ordered IMI to prepare suggested findings of fact and conclusions of law, expressly granted Firstier the opportunity to submit objections to IMI's suggested findings and conclusions, and advised the parties that "[t]he Court will then modify, add to it, delete and write its own findings of fact and conclusions of law *and judgment* on each of these eight policies that we have talked about." Transcript 1/26/89, Appendix "C" to Petition for a Writ of Certiorari at 15-16 (emphasis added).

Second, the parties did not waive the separate-document requirement. Pursuant to the Court's request, both parties subsequently submitted suggested findings of fact and conclusions of law and awaited the trial court's own findings of fact and conclusions of law *and judgment.* Third, the trial court's oral announcement was not entered in the clerk's docket because it was not intended as a judgment — as noted, the trial court expressly said at the January 26, 1989 hearing that it would write its own findings of fact and conclusions of law *and judgment.*[2]

[2] The docket entry on January 26, 1989 merely recites that the hearing occurred, that the trial court heard oral argument, that the trial court indicated that the policies should be cancelled, that the parties should submit suggested findings of fact and conclusions of law, and that the trial court would modify, add to, or delete from the suggested findings and conclusions and enter its own. *See* Civil Docket attached as Appendix "F" to the Petition for a Writ of Certiorari. The judgment of the trial court was not entered in the civil docket until March 3, 1989 when the court rendered its "Memorandum Opinion and Order" and a separate "Order and Judgment." *Id.*

Unlike the situation in *Bankers Trust,* the fact that a judgment was not set forth on a separate document on January 26, 1989 was not an "error" or an "accident". The trial court did not intend that its oral announcement would be its final decision and the parties did not "waive" the separate-document requirement. Under such circumstances, the January 26, 1989 oral announcement cannot be considered a final decision and the *Bankers Trust* case is inapplicable.

D. RULE 4(a)(2) OF THE RULES OF APPELLATE PROCEDURE DOES NOT VALIDATE THE PREMATURE NOTICE OF APPEAL.

Rule 4(a)(2) of the Rules of Appellate Procedure provides:

> Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

Rule 4(a)(2) does not operate to render the February 8, 1989 Notice of Appeal effective because the January 26, 1989 oral announcement was not a final decision. Moreover, even if the January 26, 1989 oral announcement was a final decision, Rule 4(a)(2) does not save the premature appeal because the Petitioner filed a tolling motion before entry of judgment which rendered the February 8, 1989 Notice of Appeal a nullity.

1. Rule 4(a)(2) Does Not Render the Premature Notice Effective Because the Notice Was Not Filed After Announcement of a Final Decision.

By its express terms, Rule 4(a)(2) validates a premature notice of appeal only when the notice is filed after a decision or order but before the entry of judgment. In light of Rule 1(b) which explicitly provides that the Rules of Appellate Procedure "shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law," Rule 4(a)(2) can be read *only* to validate premature appeals taken from "final decisions" as that term is used in 28 U.S.C. §1291. *General Television Arts, Inc. v. Southern Railway Co.*, 725 F.2d 1327, 1330-1331 (11th Cir. 1984); *Osterneck v. E.T. Barwick Ind., Inc.*, 825 F.2d 1521, 1527 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney*, ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d 819 (1987); *United States v. Hansen*, 795 F.2d 35, 38 (7th Cir. 1986); *Robinson v. Tanner*, 798 F.2d 1378, 1382-83 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987). Indeed, it is only from such final decisions that §1291 confers appellate jurisdiction on the courts of appeals. *Id. See also Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 647 (10th Cir. 1988) (dissenting opinion).

This is the precise issue that was before the Eleventh Circuit in *General Television, supra.* The appellant had filed its notice of appeal after the trial court had entered a *partial* summary judgment but before the entry of a final decision. The premature appeal could not be saved by a Rule 54(b) certification because the partial summary judgment went only to the issue of liability.

Therefore, the appellant argued that the Court should give Rule 4(a)(2) a liberal reading and allow the appeal. The Court refused, holding that Rule 4(a)(2) validated only those premature notices of appeal that are filed after announcement of a *final* judgment but before the final judgment is formally entered:

> "The purpose of that rule is to avoid the harsh result that may obtain when a district court has announced its final judgment and zealous counsel in his haste to file a notice of appeal does so before the district court formally enters the order containing its judgment. The rule was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment. Hence this Court and its predecessor continue to hold after the enactment of Rule 4(a)(2) in 1979 that a final judgment does not "retroactively validate the premature notice of appeal." . . . Consequently, Rule 4(a)(2) does not confer jurisdiction upon a Court of Appeals unless the appellant has filed a notice of appeal *after* the announcement of judgment but before the entry of the order.
>
> There was no announcement of the final judgment prior to GTA's filing of the notice of appeal . . . . Consequently, the district court's certification for interlocutory appeal of its partial summary judgment on liability cannot be considered an announcement of final judgment. Because this court is without jursdiction, the APPEAL IS DISMISSED."

General Television, 725 F.2d at 1330-31 (citations and footnotes omitted). *Accord, Hansen*, 795 F.2d at 38, *Robinson*, 798 F.2d at 1382-83.

General Television and the authorities cited above comport with the plain meaning of Rule 4(a)(2) and establish that the February 8, 1989 Notice of Appeal is ineffective because it was filed after entry of an interlocutory, not a *final* decision. Accordingly, the Court of Appeals in the instant case properly dismissed the appeal.

2. The Court of Appeals' Decision Does Not Conflict With Decisions From Other Circuits.

Firstier argues that the Court of Appeals' decision in this case conflicts with decisions from the District of Columbia and Third Circuit, citing *Sacks v. Rothberg,* 845 F.2d 1098 (D.C. Cir. 1988) and *Dowling v. City of Philadelphia,* 855 F.2d 136 (3rd Cir. 1988). However, the *Sacks* and *Dowling* cases involved situations where the trial courts had entered summary judgments disposing of some but not all of the claims at issue. The parties against whom judgment had been rendered filed appeals before judgment was entered on the remaining claims and without first obtaining Rule 54(b) certifications. Both Courts held that the respective appeals ripened when the remaining claims were finally disposed of. *Sacks,* 845 F.2d at 1099; *Dowling,* 855 F.2d at 138.

The *Sacks* and *Dowling* decisions do not conflict with the Court of Appeals' decision in this case. Rather, they are consistent with the general rule recognized in all circuits, *including the Tenth Circuit,* that in cases involving multiple claims and multiple parties, a notice of appeal filed after entry of an interlocutory order disposing of some but not all of the claims or parties may nevertheless be rendered effective if the interlocutory order is later rendered final by disposing of the remaining claims or by subsequently entering a Rule 54(b) certification. *Lewis v. B.F. Goodrich Co.,* 850 F.2d 641, 643-644 (10th Cir. 1988). In fact, this is the precise context in which the Tenth Circuit recently held that Fed. R. Civ. P. 4(a)(2) permits the interpretation that a subsequent Rule 54(b) certification ripens a premature notice and saves the appeal. *Id.* at 645.

Critically, in a Rule 54(b) situation, the otherwise "premature" appeal satisfies the jurisdictional requirements imposed by 28 U.S.C. §1291 because a Rule 54(b) certification can be granted only where the decision appealed from finally disposes of an entire claim or party. Obviously, this rationale is inapplicable where, as here, the decision appealed from is not final because the trial court has retained power to amend the judgment and has indicated its intent to prepare a formal judgment and separate findings and conclusions as to all claims. *See Osterneck v. E.T. Barwick Ind., Inc.,* 825 F.2d 1521, 1527 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney,* ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989); *Century Laminating, Ltd. v. Montgomery,* 595 F.2d 563, 566 (10th Cir. 1979), *cert. dismissed,* 444 U.S. 987 (1979); *Robinson v. Tanner,* 798 F.2d 1378, 1382-83 (11th Cir. 1986), *cert. denied,* 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987).[3] Thus the

[3] Petitioner's reliance on *United States v. Green,* 847 F.2d 622 (10th Cir. 1988), is misplaced. *Green* involved an appeal from a *criminal* conviction and was expressly grounded on the "harmless error" doctrine expressed in Fed. R. Crim. P. 52(a). *Id.* at 624-25. Further, the appeal was taken only after Green entered a conditional plea of guilty under Fed. R. Crim. P. 11(a)(2), which permits an appeal of "the adverse determination of any specified pretrial motion". There are no

Sacks and *Dowling* cases are inapposite and do not conflict with the Court of Appeals' decision in this case.[4]

3. Even if Rule 4(a)(2) Could Otherwise be Read to Validate the February 18, 1989 Notice of Appeal, that Notice was Rendered a Nullity Because it was Filed Before Judgment was Rendered on a Rule 4(a)(4) Tolling Motion.

Rule 4(a)(2) validates premature notices of appeal filed after the announcement of a final decision "except as provided" in Rule 4(a)(4). *See* Rule 4(a)(2) of the Rules of Appellate Procedure. Rule 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order

similar rules at issue in the instant case.

[4] Only the Fifth Circuit has held that Rule 4(a)(2) validates a premature appeal taken from an interlocutory decision. *Alcom Electronic Exchange, Inc. v. Burgess*, 849 F.2d 964, 969 (5th Cir. 1988). However, *Alcom* does not present a real conflict between the circuits because *Alcom* was not an *en banc* decision. The *Alcom* panel acknowledged that its decision conflicted with prior Fifth Circuit precedent, *see United States v. Taylor*, 632 F.2d 530 (5th Cir. 1980), but concluded that it was required to follow a previous panel decision which preceded the *Taylor* case. *Alcom*, 849 F.2d at 967-968. Even so, the *Alcom* court stated that the *Taylor* rule, and not the rule adopted by the *Alcom* panel, was the better reasoned approach. *Id.* at 967-969. In *Robinson v. Tanner*, 798 F.2d 1378 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987), the Eleventh Circuit attempted to reconcile the conflicting Fifth Circuit precedent and concluded that no real conflict existed.

> denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

The Supreme Court has made clear that a notice of appeal filed before entry of judgment on one of the motions listed in Rule 4(a)(4) is a nullity. In *Acosta v. Louisiana Department of Health and Human Resources*, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986) the Supreme Court articulated the effect of a Rule 4(a)(4) tolling motion as follows:

> "Rule 4(a)(4) constitutes an exception to the general rule that a notice of appeal filed after announcement of an order but before its entry in the docket will be deemed timely filed .... [Rule 4(a)(4)] establish[es] the rule that a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59 motion or any of the other motions to which the subdivision applies."

Accosta, 106 S.Ct. at 2878. *Accord Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 2883. In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982), the Supreme Court reached a similar conclusion as to the effect of a Rule 4(a)(4) motion on a notice of appeal filed before entry of judgment on the motion:

> The notice of appeal filed in this case on November 19, 1980, was not merely defective; it was a nullity. Under the plain language of the current Rule, a premature notice of appeal 'shall have no effect'; a new notice of appeal

> 'must be filed.' In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'

Griggs, 103 S.Ct. at 403 (citations and footnotes omitted).

Firstier filed two pleadings on February 13, 1989 which it called "Objection to Defendant's Suggested Findings of Fact and Conclusions of Law" and "Firstier's Suggested Findings of Fact and Conclusions of Law", respectively. Both pleadings assail the decision announced by the trial court at the January 26, 1989 hearing and argue for findings and conclusions that support a decision in favor of Firstier on IMI's Motion for Summary Judgment. Both pleadings specifically urge the trial court to find that "IMI is not entitled to summary judgment." *See* Appendices "A" and "B". Consequently, the two pleadings must be categorized either as a request under Rule 52(b) to amend or make additional findings of fact or a request under Rule 59(e) to alter or amend the judgment.[5] *See generally Osterneck v. Ernst & Whinney,* ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d

[5] Rule 52(b) and Rule 59(e) both require that motions made under those rules be made "not later than 10 days after entry of judgment." Thus Firstier's motions are untimely with respect to the January 26, 1989 interlocutory oral announcement. However, Firstier's motions were made "not *later* than 10 days after entry of" the March 3, 1989 final judgment and are thus timely. Courts construing Rule 52(b) and Rule 59(e) have held that motions filed pursuant to those rules are valid even when they are filed before entry of final judgment. *Craig v. Lynaugh,* 846 F.2d 11, 13 (5th Cir. 1988); *Agostino v. Ellamar Packing Co.,* 191 F.2d 576, 577 (9th Cir. 1951); *Lewis v. United States Postal Service,* 840 F.2d 712, 713-714 (9th Cir.1988); *Greenwood v. Greenwood,* 234 F.2d 276, 278 (3rd Cir. 1956).

146 (1989) (a motion falls under Rule 59(e) and triggers the requirements of Fed. R. App. P. 4(a)(4) when it involves "reconsideration of matters properly encompassed in a decision on the merits") (quoting *White v. New Hampshire Dep't of Employment Security,* 455 U.S. 445, 451, 102 S.Ct. 1162, 1166, 71 L.Ed.2d 325 (1982)); *Martinez v. Sullivan,* 874 F.2d 751, 753 (10th Cir. 1989).

Judgment on Firstier's Rule 52(b) and/or 59(e) motions was not entered until March 3, 1989 when the trial court rendered formal judgment and issued separate findings of fact and conclusions of law. The March 3, 1989 Order and Judgment and separate Memorandum Opinion and Order reaffirmed the earlier interlocutory oral announcement, thereby implicitly overruling the tolling motions. *See Director of Revenue, State of Colorado v. United States,* 392 F.2d 307, 310 (10th Cir. 1968); *Agostino v. Ellamar Packing Co.,* 191 F.2d 576, 577 (9th Cir. 1951). Consequently, Rule 4(a)(2) cannot save the premature notice of appeal and Rule 4(a)(4) renders it a nullity. Therefore, the Court of Appeals properly dismissed this appeal for want of jurisdiction.

CONCLUSION

The Court of Appeals properly dismissed this appeal for want of jurisdiction and the Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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-and-

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PROOF OF SERVICE

This is to certify that on the 25th day of January, 1990, three copies of this Brief for Respondent in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were deposited in the United States mail, with first class postage prepaid, addressed to:

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ACKNOWLEDGMENT

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 25th day of January, 1990.

Notary Public

My Commission Expires:
June 18, 1993
(SEAL)

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

[Filed February 13, 1989]

OBJECTION TO DEFENDANT'S SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Firstier Mortgage Co., a/k/a Realbanc, Inc. ("Firstier"), objects to the suggested findings of fact and conclusions of law submitted by Defendant, Investors Mortgage Insurance Co., ("IMI") who numbers are indicated herein,[1] for the following reasons:

1. Although Plaintiff denies it, the Court found:[2]

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[1] The paragraph numbers in Firstier's objection correspond to the paragraph numbers of the factual contentions and legal conclusions to which the objections are directed.

[2] Quotations from Transcript of Judge's Order before the Honorable Luther L. Bohanon, United States District Judge, on oral argument on January 26, 1989 on

"There's no question in my mind but what the package was submitted in bad faith; very, very bad faith. I don't have any trouble finding that it was submitted with dishonesty in mind to get the insurance company to pay for these properties.

"I find no justification for dropping the appraised value from $94,000 down to where they did."

Transcript, page 2, lines 8 through 13.

* * * *

"I don't think there's any question, no question at all in my mind that this is a case where there's deliberate, willful, misleading an insurance company to guarantee the payment of these properties.

"The Court had difficulty in understanding just why they suddenly and without just cause dropped the value from the $94,000 appraised value to 20 percent less; they had to make the deal. I think that's the only reason it was done."

Transcript, page 3, lines 18 through 24.

* * * *

"MR. DAWSON: Could I ask you to clarify for us, you made a couple of statements that the package was submitted in bad faith and submitted with dishonesty in mind.

"Is it the Court's ruling — I'm not arguing with the Court at all — that that was a bad faith of Firstier or dishonesty in the mind of Firstier?

"THE COURT: Well, it would be the bad faith of Firstier.

Defendant's Motion For Summary Judgment ("Transcript").

"MR. DAWSON: Okay.

"THE COURT: And the bad faith of the borrower, both of them. They worked together."

Transcript, page 4, lines 2 through 12.

* * * *

2. Finding No. 2 says that "Firstier applied to IMI for private mortgage insurance coverage on each of the eight mortgage loans." Firstier did not submit an application for the mortgage insurance. Firstier merely sent its entire loan files for each of the eight mortgage loans to IMI for IMI's independent underwriting review pursuant to IMI's "risk partnership" with Firstier. See Firstier's Factual Contentions Nos. 4, 5, 6, 7, 11 and 20, Firstier's Response to Defendant's Motion For Summary Judgment filed October 17, 1988. ("Firstier's First Response.")

4. Firstier submitted its entire loan package to IMI. The documentation in the loan package did not comprise an "insurance application package." That term is the invention of counsel for the Defendant. It was never used by the parties. Firstier also objects to IMI's Suggested Finding No. 4 because it fails to describe all of the documentation which Firstier sent to IMI. See Firstier's Factual Contentions Nos. 4, 5, 6, 7 and 11, Firstier's First Response.

7. The representation of Firstier in the Affidavit of Purchaser and Vendor is: "Lender by execution hereof represents that the aforementioned statements are true and correct *to the best of its knowledge.*" (emphasis supplied.) The Affidavits of Purchaser and Vendor state that the total purchase price for each property is $94,000.00, that the cash equity equals $18,800.00,

and that the first mortgage amount is $75,200.00. In the Affidavits, the vendor states, inter alia: "that certain of the prepaid expenses involved in the transaction (i.e., interest charges, real estate taxes, hazard insurance premiums, and private mortgage insurance renewal premiums) have not been paid by the vendor on behalf of the property purchaser." In the Affidavits, the Purchaser and Vendor acknowledge the inducement purpose of the Affidavit as set forth on the Affidavit. Exhibit 5, and Factual Contention No. 6(a), Firstier's First Response.

8. IMI's Proposed Finding No. 8 erroneously states that each of the Settlement Statements was signed by the settlement agent. The settlement agent did not sign the Settlement Statement for the Charles O. and Mary Anne Wolfes' loan. Exhibit W to IMI's Motion For Summary Judgment. Bill Tucker made the down payments for the borrowers at the various closings *as their realtor*, not as seller of the properties. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Supplemental Brief in Opposition to Defendant's Motion For Summary Judgment (Firstier's Third Response), paragraphs 6 and 7, pages 2 and 3.) There is evidence that Charles O. and Mary Anne Wolfes and Parke H. and Glenda A. Largent made earnest money deposits and down payments in connection with the purchases of three of the properties. (Firstier's First Response, Factual Contentions Nos. 25 and 26.)

9. Firstier objects insofar as said finding recites that Mr. Tucker's cancelled check conclusively establishes that the Staats did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature

of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 27.)

10. Firstier objects insofar as said finding recites that Mr. Tucker's cancelled check "conclusively establishes" that Mr. Larry Busking did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 28.)

11. Firstier objects insofar as said finding recites that Mr. Tucker's cancelled check "conclusively establishes" that Mr. Don Armstrong did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 29.)

12. Firstier objects insofar as said finding recites that Mr. Tucker's cancelled check "conclusively establishes" that Keith H. and Paula K. Busking did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 30.)

13. Firstier objects insofar as said finding recites that Mr. Tucker's cancelled check "conclusively establishes" that Parke H. and Glenda A.

Largent did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 26.)

14. The Largents' loan application says that the source of their down payment was "Sale of Duplex *& Bank Accounts.*" The Largents made earnest money deposits for both properties in the total amount of $10,000.00. They had $17,000.00 in cash as a source of the down payment for the purchase of the properties. The sale of the duplex simply did not go through because the buyer did not have enough money. The sale was not a sham. (Firstier's First Response, Factual Contention No. 26.)

15. Charles O. Wolfes testified that he *did* make his down payment. (Firstier's First Response, Factual Contention No. 25.) Plaintiff objects insofar as said finding recites that Mr. Tucker's cancelled check "conclusively establishes" that Mr. and Mrs. Wolfes did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 25.)

16. Firstier objects insofar as suggested finding No. 16 asks the Court to find that none of the borrowers had cash equity in the properties and that none of the borrowers made down payments

or had personal funds at risk on any of the eight loans. (Firstier's First Response, Factual Contentions Nos. 25, 26, 27, 28, 29 and 30.)

17. Firstier did not "induce" IMI to insure the subject loans. Firstier merely sent IMI its entire loan file for IMI's *independent* underwriting review. See Firstier's First Response, Factual Contentions Nos. 4 and 5. Firstier *never* represented that the total purchase price for each property was $94,000.00, that the mortgage amount was $75,200.00, and that the loan-to-value ratio was 80%, and that each borrower had a cash equity in the respective properties equal to 20% of the purchase price. Those statements were representations of the buyer and seller. Firstier merely told IMI that the buyers' and sellers' statements "are true and correct *to the best of its knowledge.*" This Affidavit was prepared by IMI. (Firstier's First Response, Factual Contention No. 6.)

The true loan-to-value ratio was *not* 100%. Loan-to-value ratio, in the real estate mortgage industry, is not determined by the *purchase* price of the mortgaged property. Loan-to-value ratio is based on the *appraised* value of the property securing the real estate mortgage. Comparing the loan amounts with the appraised values of each of the properties at the time these loans were made results in a loan-to-value ratio of 80%. (Affidavit of Kenneth E. McBride, paragraph 9, pages 3 and 4, Exhibit A to Firstier's Third Response.)

18. All of the loans had an 80% loan-to-value ratio. The properties were appraised at $94,000.00. Each loan was in the original principal amount of $75,500.00. (Firstier's First Response, Factual Contention No. 15; Affidavit of Kenneth

E. McBride, Exhibit A to Firstier's Third Response, paragraph 9 at pages 3 and 4.) The sales price, appraised value and loan-to-value ratio were merely identifying or "designating" items of information on the face of the Commitment/Policies. This identifying information is not part of Firstier's representations to IMI. Firstier's representations are set out separately at the bottom of each Commitment/Policy. (Commitment/Policies, Exhibit B to IMI's Motion For Summary Judgment.)

19. American-First was not Firstier's agent. The realtors selected American-First to close the property purchases. Firstier merely used American-First as a stakeholder. [Firstier's First Response, Factual Contention No. 13; Affidavit of Kenneth E. McBride, paragraph 10, page 4, Exhibit A to Firstier's Third Response; Affidavit of Robert Gondring, paragraph 4, Exhibit A to Response to Defendant's Reply to Firstier's Response to Defendant's Motion For Summary Judgment filed on November 17, 1988 ("Firstier's Second Response")].

20. We do not know what Ms. Lowery knew. Nobody ever took her deposition. There is nothing in the loan files, the Affidavit of Merleta Motley, and the checks attached to her Affidavit, which would indicate to a loan closer that there was anything irregular about the loans. The source of funds brought to a loan closing does not always indicate the nature of the funds. For example, a realtor may bring money to the closing that represents funds that the buyer/borrower placed with the realtor. In these loans, Bill Tucker acted both as seller and as realtor. (Affidavit of Kenneth E. McBride, paragraph 6, page 2,

Exhibit A to Firstier's Third Response.) The fact that Mr. Tucker, acting as realtor, brought some checks to the closing does not establish that Mr. Tucker, as seller, made down payments on behalf of the borrowers. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 through 8, pages 2 and 3.)

21. These were negative amortization loans. The Notes sent to IMI provided that the total indebtedness could increase to 125% of the original principal amount. (Factual Contention No. 16, Firstier's First Response.) The mortgages stated total indebtedness of $94,000.00, which was the *cap* that was placed upon the negative amortization mortgage loan. IMI's underwriters were familiar with the concept of "negative amortization loans." In a negative amortization loan, the amount of indebtedness on the loan continues to increase during the negative amortization period of the loan, typically during the first few years of the loan. Unless the property securing the loan appreciates during the negative amortization period, the borrower's equity in the property would probably be eliminated or reduced as the indebtedness on the loan increases. (Firstier's First Response, Factual Contention No. 21; Affidavit of Mac Martin, paragraph 7, page 3, Exhibit 8 to Firstier's First Response.)

22. When these loans were made, IMI's underwriters made decisions to insure mortgage loans based in part on the expectation that property values in Oklahoma would continue to increase. (Affidavit of Mac Martin, paragraph 6, page 3, Exhibit 8 to Firstier's First Response; Firstier's

First Response, Factual Contentions Nos. 15, 16, 17, 18, 21 and 22.) There were no "insurance applications."

23. See Firstier's objections to IMI's Suggested Findings Nos. 21 and 22.

24. IMI's private investigators concluded that some of the borrowers had made down payments and some of them had not. Parke and Glenda Largent did not tell the investigators that they did not make a down payment. Charles O. Wolfes told the investigators that he *did* make a down payment, so the investigators decided that coverage should be denied because the indebtedness described on the mortgage was $94,000.00. IMI later withdrew this basis for denial of coverage on Mr. Wolfes' mortgage, and now asserts that coverage should be denied because Mr. Wolfes did not make a down payment. But, he did make a down payment. When some of the borrowers told the investigators that the purchases of the duplexes were straight up deals, and that they did make the down payments, the investigators became rude and pushy. (Firstier's First Response, Factual Contention No. 3, 21, 25 and 26.)

25. See Firstier's Objection to IMI's Suggested Finding No. 24.

26. IMI did not submit "application" forms for Firstier to sign and submit. It had insurance application forms which it could have required Firstier to fill out and submit. Instead, IMI chose to "share the risk" of loss with Firstier. (Firstier's First Response, Factual Contention Nos. 4 and 11; Affidavit of Mac Martin, paragraphs 3 and 5, Exhibit 8 to Firstier's First Response.) In 1982, IMI's underwriters did not always rely solely on infor-

mation supplied by lenders. IMI also relied on its underwriters' knowledge of the local market and its hope that property values in Oklahoma would continue to increase. (Affidavit of Mac Martin, paragraphs 4 and 6, Exhibit 8 to Firstier's First Response.)

27. The Commitment/Policy in effect in 1983 defines representations of the insured lender. Page 2 of the Commitment/Policy "Terms and Conditions" says at paragraph 19(a), entitled "MODIFICATION", that the policy shall not be modified or amended in any way except in writing signed by an authorized officer of the company. All of Firstier's representations, as defined in IMI's Commitment/Policy, were true. See Firstier's First Response, Factual Contention Nos. 9 and 10.

28. IMI had its own underwriters in 1982 and 1983. IMI's underwriters were charged with the responsibility to independently decide whether to insure the lender against losses sustained by reason of a borrower's default on a lender's mortgage loan. IMI's underwriters were required to make their own independent determination to "share the risk" with the lender, primarily by deciding whether the borrower could repay the loan, and whether the value of the mortgaged property appraisal would support the loan. (Firstier's First Response, Factual Contention Nos. 7 and 8; Affidavit of Mac Martin, paragraph 3, Exhibit 8 to Firstier's First Response.)

29. See Response to Suggested Finding No. 28. Firstier followed IMI's instructions exactly. The Affidavits were signed and the other verifications were acceptable.

30. In 1982 and 1983, when these loans were made, IMI promised Firstier that negative spot check review findings would *in no way affect the validity* of the commitment or policy of insurance. Instead, adverse information gathered during the spot check review would be used by IMI to help the lender in providing consistent and reliable information for insurance underwriting. In 1982 and 1983, IMI never cancelled coverage on its mortgage guaranty insurance policies based on negative spot check reviews. It was not until 1986 that IMI decided to change this policy. (Firstier's First Response, Factual Contention Nos. 18, 19 and 22.)

RESPONSE TO CONCLUSION OF LAW

1. Title 36, Section 3609 is not available to mortgage guaranty insurers. See Plaintiff's Limited Response Brief to Defendant's Motion For Summary Judgment (Plaintiff's First Limited Response) filed May 2, 1988; Plaintiff's Response to Defendant's Response to Plaintiff's Limited Response to Defendant's Motion for Summary Judgment ("Plaintiff's Second Limited Response") filed June 17, 1988.

2. IMI knew the difference between a loan file and an insurance application. It had insurance applications which it could have required Firstier to fill out and submit. Instead, it chose to rely on Firstier's loan file when it entered its "risk partnership" with Firstier. (Firstier's first Response, Factual Contention Nos. 4, 5 and 11.) There is no evidence of any "negotiations" as the Court thought might possibly have occurred (Order of the Court dated September 15, 1988). IMI's own policies rule out the possibility that any

oral statements or representations would have any force or effect. (Firstier's First Response, Factual Contention Nos. 5 and 9.)

3. IMI wrote these insurance policies. The policies are IMI's contractual agreement with Firstier. 36 O.S. 1981 §3613. In the policies, IMI agreed that Firstier only made five representations in connection with the policies. (Exhibit 4 to Firstier's First Response; page 3 of Firstier's Brief in Support of its First Response.) *Now,* IMI has changed its contractual definitions of representations of the lenders to include statements of the borrowers. (Firstier's First Response, Factual Contention No. 12.) But that was not the definition of lenders' representations which IMI used in 1982 and 1983. Representations of the borrowers were not representations of Firstier when these loans were made.

5. The Affidavits of Purchaser and Vendor contain numerous representations of the Purchaser and Vendor. Then, at the bottom of the Affidavit, the lenders' representation is defined: "Lender by execution hereof represents that the aforementioned statements are true and correct *to the best of its knowledge.*" (emphasis supplied.) This representation was absolutely true. Neither Firstier nor American-First knew that the purchasers' and vendors' representations were false. (Affidavit of Robert Gondering, Exhibit A to Firstier's Second Response; Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response.) There were no misrepresentations within the meeting of 36 O.S. §3609.

6. The Commitment/Policy defines the representations of the insured lender. (Exhibit 5 to

Firstier's First Response.) All of these representations of Firstier were absolutely true. (Firstier's First Response, Factual Contention Nos. 9 and 10.) All of Firstier's representations in connection with these loan applications were made in good faith and are mere expressions of opinion, or "subjective representations" which were true. Since Firstier's statements were made in good faith, they were true. *United Benefits Life Insurance Company v. Knapp,* 51 P.2d 963 (Okla. 1935).

7. Even assuming 80% loan-to-value was a material term to the policy, IMI waived literal compliance with the term. Before IMI ever committed to issue the eight mortgage insurance policies, Firstier provided IMI with copies of all of the promissory notes. The promissory notes say that the total indebtedness on the loans could increase to 125% of the original principal amount. At the time that IMI issued the mortgage insurance policies, it knew that the loan-to-value ratio could exceed 100%. It waived literal compliance with the 80% loan-to-value term of the Commitment/Policy. *Hidalgo Properties, Inc. v. Wachovia Mortgage Co.,* 617 F.2d 196, at 199. (10th Cir., W. D. of Okla. 1980); *Federal Deposit Insurance Corporation v. Palermo,* 815 F.2d 1329, 1338, (10th Cir. 1987); *Indian Territory Operating Co. v. Bridger Petroleum Corp.,* 500 F.Supp. 449, 451 (W.D. of Okla. 1980).

IMI prepared and sent its operations manual to its lenders. The manual said that faulty appraisals, bad credit reports and other negative review findings would in no way affect the lenders' coverage. In 1982 and 1983, IMI had *never* cancelled its insurance policies based on negative review findings. After IMI issued these poli-

cies, Defendant changed its program. But by its own written directions and conduct, IMI waived literal compliance with its underwriting guidelines regarding property values and the creditworthiness of the borrowers.

8. The Court also found Firstier to be guilty of "bad faith" in submitting this application. The borrowers on three of the loans did make down payments and had cash equity in the properties. If any of the borrowers perpetrated a fraud, it was Firstier who was defrauded. The borrowers did not perpetrate their fraud on behalf of Firstier.

9. American-First was not Firstier's agent. In connection with closing the eight mortgage loans, American First was a mere stakeholder. Firstier did not delegate any authority to alter the terms of the loans, or otherwise, to American First. (Affidavit of Robert Gondring, Exhibit A to Firstier's Second Response; Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response; Affidavit of Robert Gondring, Exhibit B to Firstier's Third Response.)

10. "It is axiomatic that the existence of agency cannot be presumed. The party who relies upon the existence of the relationship is required both to allege and prove the fact of agency and the scope of the agent's authority." *Sturm v. Green,* 398 P.2d 799, 804 (Okla. 1965). IMI has the burden to allege facts essential to establish the existence of the agency relationship and the nature and extent thereof. *Keel v. Titan Construction Corp.,* 639 P.2d 1228, 1230 (Okla. 1981). In this case, the documentation shows that American First acted as agent for the buyer and the seller. The abstract company's fees were paid by the buyer and seller.

(Settlement Statements, Exhibit 11 to Firstier's First Response.) American-First got its authority to make expenditures and disbursements at closing from the buyers and the sellers. (Receipt and acknowledgement of settlement statement, Exhibit 11 to Firstier's First Response.) Firstier did not give American-First *any* authority. (Affidavit of Robert Gondring, Exhibit A to Firstier's Second Response; Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response; Affidavit of Robert Gondring, Exhibit B to Firstier's Third Response.)

There is no evidence that American-First knew that any of the information supplied at the loan closings was false. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response.) Even if American-First had known that the borrowers and sellers were supplying false information, such knowledge would not be imputable to Firstier. Had Firstier known that any of the borrowers' statements were not true, Firstier would not have made the eight mortgage loans. (Affidavit of Robert Gondring, Exhibit A to Firstier's Second Response.) If American-First knew that the buyers and sellers made misrepresentations in connection with the mortgage loans and closed the loans anyway, then American First was acting adversely to Firstier's interest. Knowledge of an agent acting adversely to the interest of his principal is not imputable to the principal. *Inryco, Inc. v. CGR Building Systems,* 780 F.2d 879, 883 (10th Cir. 1986); *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.*, 83 F.2d 14 (10th Cir. 1936). The knowledge of American-First, if

any, that the buyers and sellers made misrepresentations, if any, in connection with the eight mortgage loans is not imputable to Firstier.

11. The statements made by Firstier in connection with the eight mortgage loans are "subjective representations." They are mere statements of opinion, which are true. The subject of Firstier's opinion was that all of the information in the loan file was correct. But the subject of the representation was merely the opinion of Firstier. Since Firstier truly believed that the information in its loan files was correct, it made no misrepresentations within the meaning of 36 O.S. §3609. *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.*, 83 F.2d 14 (10th Cir. 1983); *Brunson v. Mid-Western Life Insurance Co.*, 547 P.2d 970 (Okla. 1976); *Whitlatch v. John Hancock Mutual Life Insurance Co.*, 441 P.2d 956 (Okla. 1968); *Massachusetts Mutual Life Insurance Co. v. Allen*, 416 P.2d 935 (Okla. 1966); *United Benefit Life Insurance Co. v. Knapp*, 51 P.2d 963 (Okla. 1935).

12. The cases recited in IMI's Suggested Conclusion of Law No. 12 may correctly recite the law of other jurisdictions. But that is not the law in Oklahoma. This Court must follow Oklahoma law. Under Oklahoma law, a "subjective representation" is a mere expression of opinion where the insured has no direct means of knowledge of the subject matter of the opinion. So long as the insured accurately states his opinion, there is no misrepresentation within the meaning of 36 O.S. (1981) §3609.

13. See Firstier's Response to IMI's Suggested Conclusions of Law Nos. 11 and 12.

14. The statements made by Firstier in connection with the eight mortgage loans are "subjective representations." They are mere statements of opinion, which are true. The subject of Firstier's opinion was that all of the information in the loan file was correct. But the subject of the representation was merely the opinion of Firstier. Since Firstier truly believed that the information in its loan files was correct, it made no misrepresentations within the meaning of 36 O.S. 1981 §3609. *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.*, supra.; *Brunson v. Mid-Western Life Insurance Co.*, 547 P.2d 970 (Okla. 1976); *Whitlatch v. John Hancock Mutual Life Insurance Co.*, 441 P.2d 956 (Okla. 1968); *Massachusetts Mutual Life Insurance Co. v. Allen*, 416 P.2d 935 (Okla. 1966); *United Benefit Life Insurance Co. v. Knapp*, 51 P.2d 963 (Okla. 1935).

13. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) merely said that, in ruling on defendant's motion for summary judgment in a libel action brought by a public figure, courts must apply the "clear and convincing" standard to decide whether plaintiff has produced sufficient evidence to establish that defendant acted with actual malice. However, the Court made it clear that application of this standard does not denigrate the jury's role:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whatever he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor".

Firstier submitted evidence that the down payments were made on at least three of the loans. (Firstier's Factual Contentions Nos. 25 and 26 to Firstier's Response to IMI's Motion For Summary Judgment.) The borrowers' statements that they *did* make the down payments directly controvert IMI's contentions to the contrary. They are to be "believed."

Firstier also submitted evidence that American-First was not Firstier's agent, but merely a stakeholder with *no* authority from Firstier. (Affidavit of Robert Gondring, Exhibit "A" to Firstier's Second Response.) Had Firstier known that any of the borrowers misrepresented the facts, it would not have made the loans. (*Id.*) These statements are to be "believed." *Liberty Lobby*, supra. A jury could reasonably conclude that if American-First closed the loans knowing that the borrowers misrepresented the facts, it acted adversely to Firstier in doing so, and its knowledge of any misrepresentations would not be imputable to Firstier. IMI is not entitled to summary judgement.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that on this 13th day of February, 1989, a true and correct copy of the above and foregoing OBJECTION TO DEFENDANT'S SUGGESTED FINDINGS OF FACT AND CONCLUSION OF LAW was mailed, postage prepaid to:

John P. Roberts, Esq.
Eric S. Gray, Esq.
Edwards, Roberts & Propester
Suite 2900, First Oklahoma Tower
Oklahoma City, OK 73102

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

[Filed February 13, 1989]

FIRSTIER'S SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. In January 1983, Firstier financed eight first mortgage loans on eight duplexes located in Elk City, Beckham County, Oklahoma. Firstier sent its eight mortgage loan files to IMI for IMI's independent underwriting review. [Deposition of Darlene Dawson, pages 56-60, 170-171, Exhibit 29 to Plaintiff's Response to Defendant's Motion For Summary Judgment filed October 17, 1988. ("Firstier's First Response".)] IMI had insurance applications which it could have required Firstier to fill out and submit. (Deposition of Joel H. Pasternak, page 25, Exhibit 30 to Firstier's First Response.) IMI never provided "application" forms for Firstier to sign and submit.

2. There is no evidence of any "negotiations" as the Court thought might possibly have occurred. Order of the Court dated September 15, 1988.

3. The only documents submitted to IMI which were signed by Firstier are:

(a) The Affidavit of Purchaser and Vendor, which says: "Lender, by execution hereby, represents that the aforementioned statements are true and correct *to the best of its knowledge.*" (Emphasis added.) (Exhibit 5 to Firstier's First Response.)

(b) The confirmations of loan transaction. (Exhibit 6 to Firstier's First Response.)

(c) The loan applications, which are signed by the loan officer to show how the information was gathered. (Exhibit 7 to Firstier's First Response.)

(d) The policies in question. (Exhibit 4 to Firstier's First Response.)

4. The remaining documentation sent to IMI by Firstier was prepared or signed by third parties, such as the borrower, the appraiser, credit bureaus, the borrower's banker, the borrower's employer and tenants who leased the mortgage property. (IMI's Underwriting Guidelines, Exhibit 17 to Firstier's First Response.) Defendant has submitted no evidence that plaintiff had any control over these people or any knowledge of any false statement. Firstier had no such control or knowledge.

5. When IMI receives loan packages from its lenders, it conducts its own independent review of the documents. In 1982 and 1983, IMI did not

rely solely on information supplied by the lenders. (Deposition of Joel H. Pasternak, pages 140-142, Exhibit 30 to Firstier's First Response; Affidavit of Mac Martin, Exhibit 8 to Firstier's First Response.)

6. After approval of the lender's loan file, IMI prepares a Commitment/Policy and sends it to the lender for signature. The Commitment/Policy in effect in 1983 defines representations of the insured lender. (Exhibit 4 to Firstier's First Response.) All of Firstier's representations as defined in the Commitment/Policy were true. (Deposition of Joel H. Pasternak, pages 55-59, Exhibit 30 to Firstier's First Response.)

7. All of these loans were closed at the offices of American-First Abstract Company ("American-First"). It is a common practice in the real estate mortgage business for a realtor to bring money to a real estate mortgage loan closing which represents funds that the buyer/borrower placed with the realtor. In these loans, Bill Tucker acted both as seller and as realtor. The fact that Mr. Tucker brought some checks to the loan closing does not prove that the borrowers made no down payments. [Affidavit of Kenneth E. McBride, Exhibit A to Plaintiff's Supplemental Brief in Opposition to Defendant's Motion For Summary Judgment ("Firstier's Third Response")].

8. There is nothing in the loan files, the Affidavit of Merleta Motley, and the checks attached to her Affidavit, which would indicate to a loan closer that there was anything irregular about the real estate mortgage loans. (*Id.*)

9. American-First did not know that the buyers were not making their down payments.

American-First does not close loans if it has any reason to believe the parties are not complying with the terms of the real estate purchase contract or the loan documents. There is nothing in the American-First loan files, the Affidavit of Merleta Motley and the checks attached thereto, which would tell a loan closer that the buyers were not making their down payments. (*Id.*)

10. American-First understands loan-to-value ratio to be based on the appraised value of the property securing the real estate mortgage, not the sales price. American-First has copies of appraisal reports for all of the properties which secured the mortgages and loans and which are the subject matter of this litigation. In each of American-First's files on these loans, the documentation indicates that the loan-to-value ratio is 80%. (*Id.*)

11. When American-First closes a loan, it merely acts as a stakeholder. It receives and disburses money in accordance with the buyers' and sellers' instructions. Insofar as the lender is concerned, American-First is strictly a stakeholder, not authorized to bind the lender to anything. American-First is never authorized to, nor would it, change the terms of the loan or the purchase contract. (*Id.*)

12. The realtor selected American-First to close the purchase. (Deposition of Darlene Dawson, pages 49-51, Exhibit 29 to Firstier's First Response.) Firstier just expected its check to be delivered as instructed. It did not control how American First should reach that result. (Deposition of Robert Gondring, page 83, Exhibit 27 to Firstier's First Response.)

13. All of the loans had an 80% loan-to-value ratio. The properties were appraised at $94,000.00. (Appraisal Reports of Jim Artman, Exhibit 14 to Firstier's First Response.) Each loan was in the original principal amount of $75,500.00. (Promissory Notes, Exhibit 15 to Firstier's First Response.)

14. All of the loans were negative amortization loans. The notes sent to IMI provided that the total indebtedness could increase to 125% of the original principal amount. (Promissory Notes, Exhibit 15 to Firstier's First Response.)

15. IMI instructed Firstier how to document the source of the borrower's down payments by having the buyer and seller sign the Affidavits of Purchaser and Vendor. No other instructions about how to document the source of down payments were ever given to Firstier. Firstier followed IMI's instructions. (Deposition of Joel H. Pasternak, pages 130-131.)

16. After the insurance policy was issued, sometimes IMI would conduct its own independent after-the-fact review of loan submissions received from the lenders. IMI's own written underwriting review procedures say:

> "Negative review findings *in no way affect the validity* of the Commitment or Policy of insurance which has been issued. However, frequent and significant variations between original and spot-check reports from a lender will cause IMI to contact the lender to determine the cause of the discrepancies, beginning with more frequent spot-checks to help identify the problem. All necessary steps will be taken to assist such a lender in providing consistent and reliable information for insurance under-

writing." (Emphasis supplied.) (IMI's Operations Manual "Section VI, Underwriting Review," page 33, paragraph 3, Exhibit 3 to Firstier's First Response.)

17. When IMI issued the eight mortgage guaranty insurance policies, it entered into a "risk partnership" relationship with Firstier. (Exhibit 3 to Firstier's First Response, page 36, paragraph 4.) When IMI issued the eight mortgage guaranty insurance policies which are the subject matter of this lawsuit, it was relying on the hope that these properties' values would continue to increase. (Affidavit of Mac Martin, Exhibit 8 to Firstier's First Response.)

18. In 1982 and 1983, IMI *never* cancelled coverage on its mortgage guaranty insurance policies based on negative spot-check reviews. (Affidavit of Mac Martin, Exhibit 8 to Firstier's First Response.) It was not until 1986 that IMI decided to change this policy. (Deposition of Steven Platten, pages 22 and 23.)

19. IMI's underwriting guidelines are contained in Section II, pages 14-22 of the operations manual. (Exhibit 17 to Plaintiff's First Response.) The underwriting guidelines do not require the lender to question or doubt the purchaser or vendor who signed the Affidavit supplied by IMI. (*Id.*) IMI never gave its lenders written instructions to cross examine the Affidavits of Purchaser and Vendor. (Deposition of Joel H. Pasternak, pages 139 and 140, Exhibit 30 to Firstier's First Response.) Instead, IMI merely required its lenders to sign a statement which says:

> "Lender, by execution hereby, represents that the aforementioned statements are true and

> correct *to the best of its knowledge.*" (Emphasis supplied.) (Exhibit 5 to Plaintiff's First Response.)

That is the only representation made by Firstier with respect to the facts contained in the Affidavits of Purchaser and Vendor. There is no evidence that Firstier knew that any of the purchasers' and vendors' statements were false.

A. THE BORROWERS

Charles O. Wolfes.

20. Charles O. Wolfes bought the duplex at 111 Cripple Creek for an investment. (Deposition of Charles O. Wolfes, pages 75 through 77, Exhibit 32 to Firstier's First Response.) Mr. Wolfes closed his loan with Firstier and a loan with Pool Mortgage on a duplex next door to 111 Cripple Creek on the same day. (Deposition of Charles O. Wolfes pages 48-49, Exhibit 32 to Firstier's First Response.) Both closings took place at American-First. (Deposition of Charles O. Wolfes, pages 51-54, Exhibit 32 to Firstier's First Response.) Mr. Wolfes paid a total of approximately $19,000.00 as a down payment on the two properties to American-First with a cashier's check. (Id.) Pool Mortgage Company loaned Mr. Wolfes $89,300.00 for the purchase of the duplex next door to 111 Cripple Creek. (Deposition of Charles O. Wolfes, pages 93, 94, Exhibit 32 to Firstier's First Response.)

21. Prior to the closing, the cash in Mr. Wolfes' depositories was not sufficient to make the $19,000.00 down payment. (Deposition of Charles O. Wolfes, pages 55-58, Exhibit 32 to Firstier's First Response; loan application of Charles O.

Wolfes, Exhibit 7 to Firstier's First Response.) At Firstier's request, Mr. Wolfes provided Firstier with a hand-written note that said that he was not borrowing the funds for the down payment. (Deposition of Charles O. Wolfes, page 25, Exhibit 32 to Firstier's First Response; Defendant's Exhibit 28 to Deposition of Charles O. Wolfes, Exhibit 19 to Firstier's First Response.)

22. In addition to the down payment, Mr. Wolfes put a lot of money into the duplex for repairs and improvements. When the rents on the duplexes went down, Mr.Wolfes kept making the payments to cover the rental shortfall. (Deposition of Charles O. Wolfes, pages 26; 63-67, Exhibit 32 to Firstier's First Response; Defendant's Exhibits 29 and 30 to Deposition of Charles O. Wolfes, Exhibit 23 to Firstier's First Response.) Mr. Wolfes maintained an account in Elk City and a manager who handled all of his properties. He kept a ledger of payments to the mortgagee. (Deposition of Charles O. Wolfes, pages 19-21, Exhibit 32 to Firstier's First Response.)

23. In 1982, Mr. Wolfes was actively developing property in Elk City because the market was very strong. He wanted to buy more property than he actually purchased, but all of the property was sold. (Deposition of Charles O. Wolfes, pages 32-33; 39-41, Exhibit 32 to Firstier's First Response.)

24. After Firstier made its claim to IMI for coverage on Mr. Wolfes' mortgage, IMI sent its investigators to Mr. Wolfes' office and to his home. (Deposition of Charles O. Wolfes, pages 85-86, Exhibit 32 to Firstier's First Response.) The investigators told Mr. Wolfes this was a kickback deal. (Deposition of Charles O. Wolfes, pages 79

and 80, Exhibit 32 to Firstier's First Response.) When Mr. Wolfes told the investigators that his loan was not a kickback deal, they became "hard" and "pushy". (Deposition of Charles O. Wolfes, pages 85-86, Exhibit 32 to Firstier's First Response.) The experience was unpleasant. (*Id.*)

Parke and Glenda Largent.

25. The Largents' loan application says that the source of their down payment was "Sale of Duplex & Bank Accounts." (Loan Application of Parke and Glenda Largent, Exhibit 7 to Firstier's First Response.) The Largents made earnest money deposits for both properties in the total amount of $10,000.00. (Loan Application of Parke and Glenda Largent, Exhibit 7 to Firstier's First Response.) They had $17,000.00 in cash as a source of the down payment for the purchase of the properties. (Deposition of Parke Largent, page 28, Exhibit 33 to Firstier's First Response; Deposition of Glenda Largent, pages 46-48, Exhibit 34 to Firstier's First Response.) The sale of the duplex simply did not go through because the buyer did not have enough money. (Deposition of Glenda Largent, pages 62-63, 72-73, Exhibit 34 to Firstier's First Response.) The sale was not a sham. (Deposition of Glenda Largent, page 75, Exhibit 34 to Firstier's First Response.)

26. IMI's private investigators found out that some of the borrowers had made down payments and some of them had not. Parke and Glenda Largent did not tell investigators that they did not make a down payment. (Deposition of Parke Largent, page 47, Exhibit 33 to Firstier's First Response.)

Henry and Janice Staat.

27. Henry and Janice Staat were making real estate investments in the Elk City area when they purchased the duplex at 109 Cripple Creek Lane. (Deposition of Henry M. Staat, pages 26-28, Exhibit 35 to Firstier's First Response.) Prior to closing the loan on the duplex on 109 Cripple Creek, Mr. Staat went out and looked at the duplex. (Deposition of Henry M. Staat, pages 14, 29, Exhibit 35 to Firstier's First Response.)

28. At the closing, Mr. Staat signed an Affidavit of Purchaser and Vendor. (Deposition of Henry M. Staat, page 64, Exhibit 35 to Firstier's First Response; Defendant's Exhibit 6 to Deposition of Henry M. Staat, Exhibit 5 to Firstier's First Response.) The amount of the down payment was handwritten on the Affidavit of Purchaser and Vendor. Mr. Staat does not know whether the amount of the down payment was written on the Affidavit of Purchaser and Vendor when he signed it. (*Id.*)

29. Mr. Staat considered himself to be the owner of the duplex. If the property had sold at a profit, Mr. Staat would have gotten a profit. (Deposition of Henry M. Staat, pages 71-72, Exhibit 35 to Firstier's First Response.) When rental income from the properties began to decline, Mr. Staat started trying to sell both of his Elk City properties. (Deposition of Henry M. Staat, pages 73-74, 91-92, Exhibit 35 to Firstier's First Response.) He spent his own personal funds to repair the property, paid insurance on the property, brought the loan current through year-end 1984, and continued to maintain payments on the property through May 1986. (Deposition of Henry M. Staat, pages 92-93, Exhibit 35 to Firstier's First Response; Exhibit 26 to Firstier's First Response.)

Larry Busking.

30. Larry Busking understood that he would be personally liable to Firstier on the Promissory Note. He reported the duplex as a loss on his tax return. (Deposition of Larry E. Busking, page 76, Exhibit 36 to Firstier's First Response.)

Don Armstrong.

31. When Mr. Armstrong purchased the properties at 121 and 125 Cripple Creek Lane, he had substantial money in depositories and the financial ability to pay the loans. (Deposition of Don Armstrong, pages 41-42, Exhibit 38 to Firstier's First Response; Exhibit 7 to Firstier's First Response.) Mr. Armstrong knew that he was personally liable on the notes and mortgages that he gave to Firstier. (Deposition of Don Armstrong, pages 73; 129-130, Exhibit 38 to Firstier's First Response.)

32. When Mr. Armstrong bought the properties in Elk City, the economy in Elk City was booming. (Deposition of Don Armstrong, pages 99-100, Exhibit 38 to Firstier's First Response.) He described real estate in the Elk City area as "hot". (*Id.*) At the time Mr. Armstrong purchased the Cripple Creek properties, a lot of people were purchasing investment real estate in the Elk City area. Everyone expected the price of the real estate to increase. The investors were relying on an anticipated increase in the value of the real estate in making their investment decisions. (Deposition of Don Armstrong, pages 126-127, Exhibit 38 to Firstier's First Response.)

Keith Busking.

33. Keith Busking never attended a loan closing. Instead, Bill Tucker brought all of the closing documents to Mr. Busking's home for him to sign. (Deposition of Keith Busking, pages 26; 58-59, Exhibit 37 to Firstier's First Response.) After the loan went into default, Mr. Busking did, however, attempt to make the payments. (Deposition of Keith Busking, page 19, Exhibit 37 to Firstier's First Response.)

SUGGESTED CONCLUSIONS OF LAW

1. IMI knew the difference between a loan file and an insurance application. It had insurance applications which it could have required Firstier to fill out and submit. Instead, it chose to rely on Firstier's loan file when it entered into its "risk partnership" with Firstier. There was no "application" within the meaning of 36 O.S. 1981 §3609 in this case. The statute does not apply to this case.

2. There is no evidence of any "negotiations" as the Court thought might possibly have occurred. (Order of the Court dated September 15, 1988.) IMI's own policies rule out the possibilities that any oral statements or representations would have any force or effect. There were no "negotiations" in this case within the contemplation of 36 O.S. 1981 §3609. The statute does not apply to this case.

3. IMI wrote these insurance policies. The policies are IMI's contractual agreement with Firstier. 36 O.S. 1981 §3616. In the policies, IMI agreed that Firstier only made five representations in connection with the policies. Representations of the borrowers were not representations of Firstier when these loans were made.

4. The Affidavits of purchaser and vendor contained numerous representations of the Purchaser and the Vendor. Then, at the bottom of the Affidavit, the lender's representation is defined: "Lender, by execution hereof, represents that the aforementioned statements are true and correct to the best of its knowledge." This representation was absolutely true. Neither Firstier nor American-First knew that the purchasers' and vendors' representations were false. There were no misrepresentations within the meaning of 36 O.S. 1981 §3609.

5. The Commitment/Policy defines the representations of the insured lender. All of Firstier's statements on the Commitment/Policy were true. All of Firstier's statements in connection with these loan applications were made in good faith and were mere expressions of opinion, or "subjective representations" which were true. Since Firstier's statements were made in good faith, they were true. *United Benefit Life Insurance Company v. Knapp*, 51 P.2d 963 (Okla. 1935).

6. Even assuming 80% loan-to-value ratio was a material term to the policy, IMI waived literal compliance with the term. Before IMI ever commited to issue the eight mortgage insurance policies, Firstier provided IMI with copies of all the Promissory Notes. The Promissory Notes say that the total indebtedness on the loans could increase to 120% of the original principal amount. At the time that IMI issued the mortgage insurance policies, it knew that the loan-to-value ratio could exceed 100%. It waived literal compliance with the 80% loan-to-value term of the Commitment/Policy. *Hidalgo Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, at 199 (10th Circuit

1980); *Federal Deposit Insurance Corporation v. Palermo,* 815 F.2d 1329, 1338 (10th Circuit 1987); *Indian Territory Operating Co. v. Bridger Petroleum Corp.,* 500 F.Supp. 449, 451 (W.D. of Okla. 1980).

7. IMI prepared and sent its Operations Manual to its lenders. The manual said that faulty appraisals, bad credit reports and other negative review findings would in no way affect the lender's coverage. In 1982 and 1983, IMI had never cancelled its insurance policies based on negative review findings. After IMI issued these policies, it changed its program. But by its own written directions and conduct, IMI waived literal compliance with its Underwriting Guidelines regarding property values and the creditworthiness of the borrowers.

8. The borrowers on three of the loans did make down payments and had cash equity in the properties. Some of the remaining borrowers put their own personal funds into the properties. If any of the borrowers perpetrated a fraud, it was Firstier who was defrauded. The borrowers did not perpetrate their fraud on behalf of Firstier.

9. American-First was not Firstier's agent. In connection with closing the eight mortgage loans, American-First was a mere stakeholder. Firstier did not delegate any authority to alter the terms of the loans, or otherwise, to American-First.

10. It is axiomatic that the existence of agency cannot be presumed. IMI, relying upon the existence of an agency relationship between American-First and Firstier, must both allege and prove the fact of agency and the scope of the agent's authority. *Keel v. Titan Construction*

Corp., 639 P.2d 1228, 1230 (Okla. 1981); *Sturm v. Green,* 398 P.2d 799, 804 (Okla. 1965). In this case, the documentation shows that American-First acted as agent for the buyer and the seller. The abstract company's fees were paid by the buyer and the seller. American-First got its authority to make expenditures and disbursements at closing from the buyers and sellers. Firstier did not give American-First any authority. American First was not Firstier's agent.

11. There is no evidence that American-First knew that any of the information supplied at the loan closings was false. Even if American First had known that the borrowers and sellers were supplying false information, such knowledge would not be imputable to Firstier. Had Firstier known that any of the borrowers' statements were not true, Firstier would not have made the eight mortgage loans. If American First knew that the buyers and sellers made misrepresentations in connection with the mortgage loans and closed the loans anyway, then American-First was acting adversely to Firstier's interest. Knowledge of an agent acting adversely to the interest of his ~~prin~~cipal is not imputable to the principal. *Inryco, Inc. v. CGR Building Systems,* 780 F.2d 879, 833 (10th Circuit 1986); *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.,* 83 F.2d 14 (10th Circuit 1936). The knowledge of American-First, if any, that the buyers and sellers made misrepresentations, if any, in connection with the eight mortgage loans is not imputable to Firstier.

12. The statements made by Firstier in connection with the eight mortgage loans are "subjective representations." They are mere statements of opinion, which are true. The subject of

Firstier's opinion was that all of the information in the loan file was correct. But the subject of the representation was merely the opinion of Firstier. Since Firstier truly believed that the information in its loan files was correct, it made no misrepresentations within the meaning of 36 O.S. 1981 §3609. *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.*, supra.; *Brunson v. Mid-Western Life Insurance Co.*, 547 P.2d 970 (Okla. 1976); *Whitlatch v. John Hancock Mutual Life Insurance Co.*, 441 P.2d 956 (Okla. 1968); *Massachusetts Mutual Life Insurance Co. v. Allen*, 416 P.2d 935 (Okla. 1966); *United Benefit Life Insurance Co. v. Knapp*, 51 P.2d 963 (Okla. 1935).

13. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) merely said that, in ruling on defendant's motion for summary judgment in a libel action brought by a public figure, courts must apply the "clear and convincing" standard to decide whether plaintiff has produced sufficient evidence to establish that defendant acted with actual malice. However, the Court made it clear that application of this standard does not denigrate the jury's role:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whatever he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor".

Firstier submitted evidence that the down payments were made on at least three of the loans. (Firstier's Factual Contentions Nos. 25 and 26 to Firstier's Response to IMI's Motion For

Summary Judgment.) The borrowers' statements that they *did* make the down payments directly controvert IMI's contentions to the contrary. They are to be "believed."

Firstier also submitted evidence that American-First was not Firstier's agent, but merely a stakeholder with *no* authority from Firstier. (Affidavit of Robert Gondring, Exhibit "A" hereto.) Had Firstier known that any of the borrowers misrepresented the facts, it would not have made the loans. (*Id.*) These statements are to be "believed." *Liberty Lobby*, supra. A jury could reasonably conclude that if American-First closed the loans knowing that the borrowers misrepresented the facts, it acted adversely to Firstier in doing so, and its knowledge of any misrepresentations would not be imputable to Firstier. IMI is not entitled to summary judgment.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that on this 13th day of February, 1989, a true and correct copy of the above and foregoing OBJECTION TO DEFENDANT'S SUGGESTED FINDINGS OF FACT AND CONCLUSION OF LAW was mailed, postage prepaid to:

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